No. 16,185

United States Court of Appeals

For the Ninth Circuit

FRED R. DICKSON, Warden of the California State Prison at San Quentin, California,

Appellant,

vs.

RAYNA TOM CARMEN,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLEE'S REPLY BRIEF.

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HISTORY OF THE CASE.

On May 15, 1950, an Information was filed in the Superior Court of the State of California in and for the County of Madera charging the defendant, Rayna Tom Carmen in the First Count with the crime of murder of Wilbur Dan McSwain, and in the Second Count with assault with a deadly weapon to commit murder on the person of Alvin McSwain. On May 15, 1950, said Court appointed Mason A. Bailey attorney to represent said defendant.

The defendant was thereafter found guilty on both counts and sentenced to death. On appeal to the Su-

preme Court of the State of California, the judgment was reversed as to count one (murder) and affirmed as to count two (assault). The ground for reversal was the refusal of the trial court to give proper instructions. This case is reported in *People v. Carmen,* 36 Cal. (2d) 768; 228 Pac. (2d) 281.

In October of 1951, defendant was retried on the murder charge in the Superior Court of Madera County and found guilty of the alleged crime of murder in the first degree. Defendant was again sentenced to suffer the death penalty. During the progress of the two trials, it was in evidence that the defendant and both of the McSwains were Indians.

A second appeal was then taken to the Supreme Court of the State of California. At the time set for oral argument of the appeal, Robert Peckham, an assistant United States attorney, appeared before the court and suggested that the case might present a question of Federal Jurisdiction in that the alleged crime was committed by an Indian against an Indian on United States Indian lands. The court thereupon continued the hearing for the purpose of enabling respective counsel to enter into a stipulation of facts. Such stipulations were filed, and on February 1, 1954, the California Supreme Court, by unanimous decision, reversed the judgment with directions to the trial court to dismiss the information against the defendant. The basis of the decision was the determination that the alleged crime was within the exclusive jurisdiction of the federal courts, and that the California courts had no jurisdiction. This case is reported in

People v. Carmen, 42 A.C. 199 (Cal.); 265 Pac. (2d) 900.

Thereafter, the California Supreme Court granted a rehearing and reversed its prior ruling. The basis of this decision was the holding that, in an appeal, the California Supreme Court cannot consider facts, jurisdictional or otherwise, which do not appear on the face of the record of the lower court. This decision is reported in *People v. Carmen,* 43 C. (2d) 342.

On November 10, 1954, petitioner filed his petition for Writ of Habeas Corpus before the Supreme Court of the State of California. On said date the writ was issued and the death penalty stayed pending final determination of the Habeas Corpus proceedings. On May 26, 1955, an Order of Reference was made and entered by the California Supreme Court whereby the Hon. John P. McMurray, judge of the Superior Court of the State of California in and for the County of Inyo, was appointed referee to take testimony upon certain interrogatories propounded by the court and directed to the issue of federal jurisdiction. Thereafter three hearings were held by said referee and his findings were, on May 17, 1955, filed with the California Supreme Court (Tr. 25-30). On August 2, 1957, the California Supreme Court, by a four (4) to three (3) decision, denied the writ. Dissenting opinions were filed by Justices Traynor, Carter and Schauer. This case is reported in *In Re Carmen,* 48 C. (2d) 851.

Petitioner was thereafter re-sentenced by the Superior Court of Madera County, the warrant of execu-

tion setting the death penalty for November 15, 1957. On October 25, 1957, petitioner filed his petition for Writ of Certiorari before the Supreme Court of the United States, No. 577-Miscellaneous, October Term, 1957, and on January 13, 1958, the Supreme Court denied the petition "without prejudice to an application for a Writ of Habeas Corpus in an appropriate United States District Court" (Tr. 24) (355 U.S. 954).

The defendant was again sentenced to death and the date of execution was set for April 16, 1958. On April 2, 1958, the defendant filed an amended petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of California, Southern Division. The execution was stayed pending the decision of the court on a Writ of Habeas Corpus. On date of September 11, 1958, the District Court issued the Writ of Habeas Corpus and directed that the petitioner, Rayna Tom Carmen, be released from custody. From this decision, the appellant has taken an appeal to this Court.

The decision of the District Court is reported in 165 Fed. Supp. 942.

I.

THE FEDERAL COURTS HAVE THE RIGHT TO INQUIRE INTO MATTERS OF JURISDICTION ON HABEAS CORPUS BY EXAMINATION OF FACTS OUTSIDE THE RECORD.

The attorney general sought to foreclose the District Court from examining into a jurisdictional question of large importance involving an American Indian

on narrow procedural grounds (Br. 9-15). Pertinent authority shows no justification for this position.

It is fundamental that where a court is without jurisdiction over the subject matter, its proceedings are absolutely void. Therefore, an objection to jurisdiction may be raised at any stage of the proceedings, and may be raised for the first time on appeal. Thus, the court said in *United States v. Anderson,* 60 F. Supp. 649:

> "Even the consent of the accused cannot confer jurisdiction, and it is an issue that can be made at any stage of the proceedings . . ." (p. 650).

See also:

United States v. Rogers, 23 Fed. 658;

Matson Navigation Co. v. United States, 284 U.S. 352, 52 S. Ct. 162, 76 L. Ed. 336;

Gainesville v. Brown-Crummer Inv. Co., 277 U.S. 54, 48 S. Ct. 454, 72 L. Ed. 781.

We had presumed that this was likewise the law in California. Thus, in 13 *Cal. Jur.* (2d) 597, the California rule is stated as follows:

> "Where a judicial tribunal has no jurisdiction of the subject matter on which it assumes to act, its proceedings are absolutely void in the fullest sense of the term; and a court, being competent to determine its own jurisdiction, may determine that question at any time in the proceedings, whenever that fact is made to appear to its satisfaction, either before or after judgment. Accordingly, an objection for want of such jurisdiction may be raised by answer or at any subsequent stage of the proceedings; *in fact it may*

*be raised for the first time on appeal''** (citing cases).

The rule has been heretofore applied in California even in civil cases, such as *Costa v. Banta,* 98 C.A. (2d) 181, where the court said:

> "Although the jurisdiction of that court was not questioned during the trial, it is well established that questions of jurisdiction are never waived and may be raised for the first time on appeal" (p. 182).

With this fundamental law in mind, the California Supreme Court asked Carmen and the attorney general on appeal and in support of Carmen's application to produce additional evidence, to file stipulations to the effect that the crime was committed by an Indian against another Indian on an Indian allotment title to which was held in trust by the United States Government. Under applicable federal statutes, exclusive jurisdiction was therefore vested in the federal courts, and the state court was without jurisdiction. In this regard, Section 777 of the California Penal Code expressly provides:

> "Every person is liable to punishment by the laws of this State for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States. . . ."

The California Supreme Court, therefore, by unanimous decision, concluded that the state court was without jurisdiction and that such jurisdiction was

*Emphasis is the author's unless otherwise indicated.

vested exclusively in the United States courts *(People v. Carmen,* 265 Pac. (2d) 900). A rehearing was then granted, and a divided court concluded that the proposed offer to produce additional evidence on appeal should be denied *(People v Carmen,* 43 C. (2d) 342, 348). The court was careful to say, however, that "we do not pass on the question of what remedies may be available to the defendant to show alleged lack of jurisdiction in the state court" (p. 349). In respect to the stipulations above referred to, the court decided that they were insufficient to show lack of jurisdiction, but expressly refrained from determining whether the jurisdictional question could be raised by stipulations on appeal (pp. 350-351).

There followed the habeas corpus proceedings in the state court wherein the California Supreme Court ordered a reference for the purpose of determining the jurisdictional facts. After an elaborate presentation of evidence to the referee, and his unequivocal conclusion in support of Carmen's contention, the court, by a 4-to-3 decision, decided to disregard the referee's findings. The majority concluded that the appellate court was confined to the record of the trial court on habeas corpus, even in respect to matters of jurisdiction *(In re Carmen,* 48 C. (2d) 851).

In so concluding, the majority of the state court apparently overlooked or misinterpreted well-established federal and state authority. The federal rule was clearly stated in *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, where the court said:

> "True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities not

involving the question of jurisdiction occurring during the course of trial; and that 'writ of habeas corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve not destroy constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened not narrowed since the adoption of the Sixth Amendment. In such a proceeding, 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court either in respect to the subject matter or to the person, *even if such inquiry involves an examination of facts outside of, but not inconsistent with, the record.*' Congress has expanded the rights of a petitioner for habeas corpus and the . . . effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, chap. 2, a more searching investigation in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody

pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States *into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him"* (pp. 1023-1024).

See also:

Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969;

Moore v. Dempsey, 261 U.S. 886, 43 S. Ct. 265, 67 L. Ed. 543;

Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791;

Bowen v. Johnston, 306 U.S. 19, 59 S. Ct. 442, 83 L. Ed. 455;

Waley v. Johnston, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302;

United States ex rel. McCann v. Adams, 320 U.S. 220, 648 S. Ct. 14, 88 L. Ed. 4;

United States v. Hayman, 342 U.S. 205, 72 S. Ct. 263.

As a matter of fact, in at least three federal cases involving jurisdiction over Indians, facts dehors the record were examined to determine jurisdiction:

Rice v. Olson, 324 U.S. 786, 65 S. Ct. 989, 89 L. Ed. 1367;

Ex parte Van Moore, 221 Fed. 954;

Tooisgah v. United States, 186 F. (2d) 93.

The same rule has been followed in state courts in Indian jurisdiction cases. The leading case is *State ex rel. Irvine v. District Court,* 239 P. (Mont.) 272. In a carefully considered opinion in habeas corpus, the court examined jurisdictional facts outside the record, and said:

> "Since the question of jurisdiction of the state trial court involves human liberties, as well as an asserted conflict between state and federal jurisdiction over crimes committed by such an Indian within the limits of a legally constituted, supervised, Indian reservation which lies within this state, we deem it appropriate to re-examine this question.
>
> The question of jurisdiction should be inquired into by the court at the earliest inception on its own initiative to ascertain whether that particular court has jurisdiction of that class of offense. *In re Coy,* 127 U.S. 731, 758, 8 S. Ct. 1263, 32 L. Ed. 274; *Barnes v. Hunter,* 10 Cir., 188 F. (2d) 86, 89; *Tooisgah v. United States,* 10 Cir., 186 F. (2d) 93, 96.
>
> It should be kept in mind that all congressional legislation relative to Indians and Indian affairs has been initiated and enacted for the benefit of the Indian. As was stated by the supreme court, 'According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred.' *United States v. Nice,* 241 U.S. 591, 599, 600, 36 S. Ct. 696, 698, 60 L. Ed. 1192.
>
> 'The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the

nation's history.' *Rice v. Olson,* 324 U.S. 786, 65 S. Ct. 989, 991, 89 L. Ed. 1367. Historically and consistently the federal government has always defined the legal status of the Indian and the relation which has existed between the government and the Indian as that of 'guardian and ward' or 'wards of the nation'. *United States v. Thomas,* 151 U.S. 577, 14 S. Ct. 426, 429, 38 L. Ed. 276; *State of Oregon v. Hitchcock,* 202 U.S. 60" (p. 275).

See also:

Application of Andy, 302 P. (2d) (Wash.) 963.

We had further assumed, until the *Carmen* case, that the federal rule was also the rule in California in habeas corpus proceedings. Thus, in *In re Bell,* 19 C. (2d) 488, the court said:

"A petitioner seeking habeas corpus, however, is not confined to the face of the record in attempting to sustain the burden of proving that his conviction was in violation of his constitutional rights. The courts of both the United States and California have declared that the remedy of habeas corpus permits an examination not only of the actual evidence introduced at petitioner's trial but of any necessary additional evidence bearing upon the infringement of petitioner's constitutional rights (cited cases)" (p. 501).

See also:

In re Connor, 16 C. (2d) 701;
In re Mooney, 10 C. (2d) 1.

Appellant's Cases.

None of the cases cited by appellant conflict in any way with the foregoing established authority. First, the appellant, on page 10 of his brief, cites a number of cases supposedly standing for the rule that facts outside the record cannot be examined on habeas corpus. In *Toy Toy v. Hopkins,* 212 U.S. 542, two Indians were indicted and convicted in the Oregon state court, and thereafter the Supreme Court of Oregon, on appeal, upheld their contention that the crime was exclusively within federal jurisdiction because committed on an Indian reservation. Thereafter, the defendants were tried and convicted in the federal court under an indictment charging "Columbia George and Toy Toy, Indians, with the murder of Annie Edna, an Indian woman, upon the Umatilla reservation." Five years after conviction, Toy Toy reversed his position and tried on habeas corpus to introduce evidence of facts showing lack of federal jurisdiction. Thus, these facts were in issue at the trial and decided adversely to defendant. Therefore defendant was properly foreclosed from raising the same issues, in habeas corpus, or otherwise.

Davis v. Johnston, 144 Fed. (2d) 862, is to the same effect. There the indictment charged defendant with commission of the crime within the Rosebud Indian reservation. On habeas corpus, petitioner, for the first time, tried to show that the property was not within the reservation. The court properly held:

> "The uniform rule is that where the jurisdiction of the court is an issue in the trial court and is dependent upon facts alleged, the finding of juris-

diction is conclusive on the parties in a collateral attack on the judgment on habeas corpus proceedings or otherwise" (p. 862).

Hatton v. Hudspeth, 99 Fed. (2d) 501, is another case where the indictment charged the commission of the crime "at and in and within the limits of the boundaries of the Rosebud Indian reservation." Thus the direct question of situs was put in issue.

In *Ex parte Savage,* 158 Fed. 205, the indictment charged that "Louie Savage, an Indian, upon the Grande Ronde Indian reservation, in Oregon and within the exclusive jurisdiction of the United States, killed Foster Wacheno, an Indian". Here, again, the jurisdictional facts were expressly put in issue and decided by the lower court.

Rodman v. Pothier, 264 U.S. 399, is even farther afield. The indictment there charged defendant with murder "committed in territory . . . within the exclusive jurisdiction of the United States, to wit: The Camp Lewis military reservation". Not only was the jurisdictional fact decided by the Rhode Island Federal District Court, but the defendant tried to circumvent appeal by direct application for habeas corpus to the Supreme Court of the United States. Obviously this was improper, and the matter was therefore transferred to the Court of Appeals. The same situation prevails in *In re Lincoln,* 202 U.S. 178, with the same result.

Walsh v. Johnson, 115 Fed. (2d) 816, and *Walsh v. Archer,* 73 Fed. (2d) 179, are cases decided by this Court wherein the indictments charged crimes on the

high seas within the jurisdiction of the United States. In the *Johnson* case the defendant, at the trial, unsuccessfully contended that the vessel was within the Bay of San Pedro, and not on the high seas. In the *Archer* case, there was evidence regarding the 3-mile limit, and the jury was instructed thereon. Thus, in both of these cases the issues were raised and tried in the trial court and thereby became *res judicata.*

State v. Utecht, 19 N.W. (2d) (Minn.) 706, is difficult to understand from the face of the opinion. There are several distinguishing features between the case under consideration and the *Utecht* case. First: Utecht did not raise the question of jurisdiction on appeal, as did Carmen. Second: The crime was committed upon an Indian allotment for which a trust patent had been issued, and therefore was not Indian land within federal jurisdiction. The crime in the *Carmen* case was committed on land held in trust by the United States Government and for which no fee patent had been issued. (See extended discussion of the *Utecht* case in *In re Carmen,* 48 C. (2d) 851, at pp. 872-874.)

Lehman v. Sawyer, 143 So. (Fla.) 310, appears to be totally irrelevant. The information there charged defendant with illegally catching fish in state waters. Defendant tried to anticipate trial by bringing habeas corpus proceedings wherein he charged that the fish were caught outside of state waters. The court properly held that the defendant must submit this issue to the trial court before resorting to habeas corpus. To the same effect is *State v. Davis,* 164 S.E. (N.C.) 737 (Br. p. 13).

The second argument advanced by the appellant appears on pp. 10-11 of his brief: "It has long been the law that all matters must be raised at the earliest moment or be deemed waived."

We have already seen that it is the uniform rule, both in the federal and state courts, that matters of basic jurisdiction are *never* waived.

Nothing happened at Carmen's trials which could possibly be construed as a knowing waiver of jurisdiction. Enough facts were developed, however, to put the trial court on inquiry, as pointed out in the opinion of the District Court:

> "The testimony at petitioner's trial was that both he and the victim were Indians, and that the murder occurred at the victim's residence. Although these facts alone did not fully demonstrate the lack of jurisdiction in the trial court, they should have put the State Court on inquiry as to its own jurisdiction. The right to be tried in a federal court accorded petitioner by the Ten Major Crimes Act was not a mere procedural right, waived unless asserted. It could not have been waived even by express agreement. The Ten Major Crimes Act was enacted for the protection of the Indian wards of the United States. Both the trial court and the state's attorneys had a duty to uphold this federal statute. They had a responsibility to see to it that the court did not improperly assume jurisdiction over an Indian ward of the Federal government" *(In re Carmen,* 165 Fed. Supp. 942, 950).

There is nothing in the four cases cited by appellant (Br. p. 11) in support of his implied contention

that jurisdiction is waived by silence in the trial court: (1) *Brown v. Allen,* 344 U.S. 443, did not involve matters of jurisdiction. The issues were alleged discrimination against Negroes in the selection of grand and petit juries and whether a confession was voluntary. The case does not involve waiver because these issues were raised in the North Carolina trial court, and affirmed on appeal. (2) In *Dusseldorf v. Teets,* 209 Fed. (2d) 764, the defendant challenged the ability and competency of his attorney in the California trial court. On appeal to the California Supreme Court, defendant's new counsel did not raise this issue. The Federal District Court denied habeas corpus and this Court affirmed on appeal, holding that defendant's failure to press his claim of inadequate representation by counsel either by motion to the state district court or on appeal constituted a waiver of this right and precluded relief on habeas corpus. Significantly this Court cited with approval *Moore v. Dempsey,* 261 U.S. 886, and stated that the facts did not go to the foundation of the proceedings. (3) *Burrall v. Johnson,* 134 F. (2d) 614, is completely inapposite. A jurisdictional issue was not involved. After conviction in the federal court in 1939, defendant sought habeas corpus in 1943 because of an allegedly coerced confession. Defendant had failed to appeal. Obviously defendant was four years too late in raising the issue in habeas corpus, or otherwise. (4) In *Egan v. Teets,* 251 Fed. (2d) 571, the claim was made on habeas corpus that the state trial judge had suppressed a certain appeal paper. This claim was not asserted on appeal, although it must have

been known to the defendant's counsel. This Court therefore held that the claim was waived, but was careful to point out:

> "Non-assertion of a constitutional right in court proceedings in which it would be appropriate is not necessarily a waiver of such right. As appellee himself concedes, a constitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before. *A matter is of such nature if the person asserting it did not have knowledge of the facts upon which it is based, or if, for some other adequate reason, such person was prevented from asserting it*" (p. 576).

Thirdly, commencing on p. 11 of his brief, appellant repeats an argument urged before the District Court, to wit, that this case does not involve "exceptional circumstances" within the federal rule. This argument is difficult to understand in the light of the established rule, both in the federal and state courts, that matters of jurisdiction may and should be raised at any stage of the proceedings, and may be raised for the first time on appeal (*Matson Navigation Co. v. United States,* 284 U.S. 352, 52 S. Ct. 162, 76 L. Ed. 336; *People v. Oakland Waterfront Co.,* 118 C. 234, 239).

In any event, the circumstances, as outlined by the District Court, are certainly "exceptional". These circumstances impelled the District Court to state:

> "But respondent urges that even if it be conceded that this Court has the power in this proceeding

737 (Br. p. 13).

> to look to facts outside the trial record to test the jurisdiction of the State court, the exercise of this power is proper only upon a showing of exceptional circumstances. However one might characterize the circumstances in this case, they clearly warrant the exercise of this Court's power to inquire into the jurisdiction of the State court" (165 F. Supp. 950).
>
> * * * * * * *
>
> "Under these circumstances, it becomes the plain duty of this Court to protect the jurisdiction vested in the Federal Courts by the Ten Major Crimes Act" (165 F. Supp. 951).

Appellants suggest that a claim of lack of jurisdiction because of the violation of a constitutional right is more sacrosanct than a claim of the wrongful assumption of jurisdiction in violation of a federal statute. Appellant cites *Mooney v. Holohan,* 294 U.S. 102 (Br. p. 11), where defendant had no knowledge of the alleged use of perjured testimony. In the present case Carmen had no knowledge of facts conferring exclusive jurisdiction under the applicable federal statutes. The writ of habeas corpus is available to all persons "in custody in violation of the Constitution or *laws or treaties of the United States"* (28 U.S.C. Sec. 2241). We respectfully conclude, therefore, that appellant raises a distinction without a difference.

Finally, appellant suggests a novel argument: that Carmen failed to exhaust his state remedies by not urging lack of jurisdiction in the trial court (Br. p. 14). The sole authority cited is *Brown v. Allen,* 344 U.S. 443. This case is inapplicable here. In

the first place, *Brown v. Allen,* unlike the present case, did not involve a jurisdictional question. The defendants there objected to discrimination in jury lists and alleged coercion of confessions. These matters were decided adversely to the defendants by both the North Carolina trial court and the North Carolina Supreme Court. In addition, there was available in North Carolina the writ of error *coram nobis* to test constitutional rights extraneous of the record. In the present case Carmen was unable to raise the question of jurisdiction in the trial court, and was denied this right on appeal and on habeas corpus.

In the allied case of *Daniels v. Allen* there was an additional feature: the failure of Daniels to perfect his appeal within the 60-day period permitted by North Carolina law. Mr. Justice Reed chose to decide the *Daniels* case on this ground and said:

> "As the failure to serve the statement of the case on appeal seems to us decisive, we do not discuss in detail the other constitutional issues tendered and only point out that they were resolved against petitioners by the sentencing state court and the Federal District Court" (73 S. Ct. 420; 344 U.S. 483).

We thus understand the meaning of the quotation from Mr. Justice Reed's opinion appearing out of context on page 14 of appellant's brief. That the justice in no way intended to overrule *Johnson v. Zerbst, supra,* is clearly shown by his citation of that case (73 S. Ct. 422) with approval.

The second quotation on page 14 of appellant's brief is taken from the minority opinion of Mr. Justice

Frankfurter wherein he refers to the general rule that constitutional rights, such as right to trial by jury *(Adams v. United States ex rel. McCann)* or the right of the accused to be present at all stages of a trial *(Frank v. Mangum)* may be knowingly waived at the trial or by failure to assert such errors on appeal. That Justice Frankfurter likewise had no intention of invading the rule of *Johnson v. Zerbst* or *Moore v. Dempsey, supra,* is clearly shown by the concluding sentence of the paragraph quoted by appellant:

> "However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in Moore v. Dempsey, 261 U.S. 886, 43 S. Ct. 265, 67 L. Ed. 543. Cf. Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Royall, 117 U.S. 241, 6 S. Ct. 734, 29 L. Ed. 868."

We therefore conclude that under both federal and state authority, the United States District Court has the power on habeas corpus to examine jurisdictional facts outside the record in support of a federal statute vesting exclusive jurisdiction in the courts of the United States. This would appear to be particularly true where the applicant is a ward of the federal government who made a prompt effort to present the jurisdictional facts on appeal as soon as they were suggested by the U.S. attorney.

II.

THE CRIME OF MURDER BY AN INDIAN AGAINST AN INDIAN ON INDIAN LAND IS WITHIN THE EXCLUSIVE JURISDICTION OF THE UNITED STATES.

We now come to the merits of this controversy. The basic facts contained in the stipulations filed with the California Supreme Court and the additional evidence offered before the referee on habeas corpus are uncontroverted:

(1) Wilbur Dan McSwain, the deceased, was an Indian;

(2) Rayna Tom Carmen is likewise an Indian;

(3) The crime was committed on the Maggie Jim Allotment, which consists of land held in trust by the United States Government for a 25-year period (Federal Register, November 14, 1944; 9 F.R. 3699, Executive Order No. 9500, U.S. Cong. Service 1944, p. 1539).

Under such circumstances, it is clear that applicable Federal statutes vested exclusive jurisdiction in the United States and its courts:

18 U.S.C.A. Sec. 1151 defines "Indian Country" as follows:

> "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government *notwithstanding the issuance of any patent,* and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c)

all Indian allotments, the Indian titles to which have not been extinguished including rights of way running through the same."

18 U.S.C.A. Sec. 1152 specifies what law governs the Indian country:

"Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

18 U.S.C.A. Sec. 1153, commonly known as the Ten Major Crimes Act, provides that *any Indian* who commits one of the ten major crimes (including murder or assault with a dangerous weapon) against another Indian or other person shall be subject to the same laws and penalties as all other persons committing any of such offenses *within the exclusive jurisdiction of the United States.* The section reads:

"*Any Indian* who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

18 U.S.C.A. Sec. 3242 provides that *all Indians* committing any of the ten major crimes within Indian country shall be tried in the *same courts* as all other

persons committing such crimes *within the exclusive jurisdiction of the United States.* This section reads:

> "*All Indians* committing any of the following offenses, namely, *murder,* manslaughter, rape, *assault* with intent to kill, *assault* with a dangerout weapon, arson, burglary, robbery and larceny on and within the Indian Country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

It is therefore apparent that the applicable Federal statutes unequivocally reserve exclusive jurisdiction in this case to the United States.

This was the situation that prevailed at the time the crime was committed. The meaning of the statutes and the intent of Congress is clear when we observe that it was not until Public Law 280 was passed by the first session of the 83rd Congress in 1953 that California Indians were emancipated and California courts were granted jurisdiction in this situation. This is now Section 1162 of Title 18 of the United States Codes Annotated. At the time of the crime in question, however, Congress had not seen fit to relinquish the exclusive jurisdiction of the United States.

III.

THE FEDERAL STATUTES CONFERRING EXCLUSIVE JURISDICTION ON THE UNITED STATES OVER CRIMES BY AN INDIAN AGAINST ANOTHER INDIAN ON AN INDIAN ALLOTMENT ARE CLEAR AND UNAMBIGUOUS.

The remainder of the brief of appellant (Br. pp. 15-36) consists of an effort to read into the foregoing Federal statutes something not appearing therein. If these statutes were ambiguous, which they are not, there might be justification for this effort. The statutes must, we submit, be applied in accordance with the clear and express language thereof. Tortured logic and speculation, however ingenious, cannot defeat the clear language of a statute:

(1) Petitioner and the deceased were and are "Indians" within the meaning of the Federal statutes.

Appellant argues (Br. pp. 15-17) that Carmen and the deceased were "emancipated" and therefore not "Indians" within the meaning of the jurisdictional statutes.

There is nothing in any of the statutes which even refers to "emancipation". 18 U.S.C.A. Sec. 1153 includes *"any Indian"* and Section 3242 *"all Indians"*. The only so-called "emancipation" found in any of our statutes appears in the present wording of the Dawes Act, (now 25 U.S.C.A. Sec. 349) in respect to Indian allottees, wherein it is expressly provided as follows:

> "Provided further, that until the issuance of fee simple patents, all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States."

Thus, it has always been the rule that "emancipation" can come only through the grant of a patent in fee, as stated in *People v. Pratt,* 26 C.A. (2d) 618, 621.

The cases cited by appellant (Br. pp. 15-16) do not hold to the contrary, as demonstrated by the District Court (165 Fed. Supp. 946-948). The *Louie, Bush, Monroe, Nimrod,* and *Irvine* cases were all cases wherein a patent in fee had been issued. *Campbell, Livingstone,* and *Big Sheep* are inapplicable because they did not involve any of the ten major crimes. *Ketchum* did involve the major crime of murder, but, as the District Court pointed out, (p. 947) the crime was not committed on a reservation or elewhere in Indian country. *Howard,* likewise, involved one of the ten major crimes, but the defendant was an Indian who was not a member of *any tribe,* unlike Carmen, who was found to be a member of the Mono Tribe. In discussing this case, the District Court (p. 947) states that it stands alone for even this limited holding, and appears to be contrary to the holding of this Court in *Davis v. United States,* 32 F. (2d) 860, to the effect that tribal relations have no bearing on an Indian's status within the meaning of the Ten Major Crimes Act.

The complete answer to appellant's argument lies in the findings of the referee. He found that both Carmen and McSwain were Indians by blood, enrolled as members of the Mono Tribe by the Bureau of Indian Affairs, who had received no allotment or patent in fee. Therefore, they could not be "emancipated". The District Court therefore held:

"Respondent has cited no cases, and there appear to be none, which suggest any method of emancipation which might except an Indian from the provisions of the Ten Major Crimes Act, other than the severing of all tribal relations or the obtaining of a fee patent to land allotted under the Dawes Act. Whether or not non-tribal Indians or Indians holding a fee patent to land allotted under the Dawes Act are subject to the Ten Major Crimes Act is unnecessary to decide. For there is no doubt that petitioner, who has received no allotment and is an Indian by blood, enrolled as a member of the Mono Tribe by the Bureau of Indian Affairs is an Indian subject to that Act." (165 Fed. Supp. 948.)

(2) All Indian allotments title to which is held in trust by the United States constitute "Indian country" over which there is exclusive Federal jurisdiction.

The Indian allotment which was the site of the crime for which Carmen was convicted was the Maggie Jim allotment, held in trust for a 25 year period by the United States. The Maggie Jim allotment came from lands in the public domain, to-wit, the Sierra National Forest. Appellant argues (Br. pp. 18-26) that such an allotment is not Indian country as defined by 18 U.S.C.A. Sec. 1151 because the allotment is not from an Indian reservation or from land of which the Indians have had uninterrupted use and occupancy.

The basis of this argument appears to be House Report No. 304, wherein it is stated that Indian allotments were included in the definition of Indian country on the authority of *United States v. Pelican*, 232 U.S. 442, 34 S. Ct. 396, 58 L. Ed. 676. In the *Pelican*

case an Indian was murdered on allotted land formerly part of the Colville Indian Reservation. This reservation had been restored to the public domain with the exception of certain 80-acre allotments title to which was held in trust by the United States government for 25 years. The District Court held that the allotment was not "Indian country" within the meaning of 18 U.S.C.A. Sec. 1151 as then written. The Supreme Court reversed this holding and said:

> "Although the lands were allotted in severalty, they were to be held in trust by the United States for 25 years for the sole use and benefit of the allottee, or his heirs, and during this period were to be inalienable. That the lands, being so held, continued to be under the jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians, is not open to controversy. *United States v. Rickert,* 188 U.S. 432. . . ." (p. 447)

That the Supreme Court in no way intended to confine Federal jurisdiction to Indian allotments from a particular source is shown by the fact that the reservation from which the allotment was made had itself been created out of the public domain rather than from land which had previously been in Indian possession, as pointed out by the District Court (165 Fed. Supp. 945) in this case. Moreover, the Supreme Court noted that in an earlier decision, *Donnelly v. United States,* 228 U.S. (Cal.) 243, 33 S. Ct. 449, 57 L. Ed. 820, it had been held that a reservation carved out of the public domain was just as much Indian country as a reservation created from land which had

always been occupied by Indians. In the *Donnelly* case the court said:

> "In our judgment, nothing can more appropriately be termed 'Indian country', within the meaning of those provisions of the Revised Statutes that relate to the regulation of the Indians and the government of the Indian country than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation." (p. 458)

In the present case, the land which was the site of the alleged crime was also a part of the public domain set aside for Indian use as an Indian allotment. The court in the *Donnelly* case on this point said:

> "It is contended for plaintiff in error that the term 'Indian country' is confined to lands to which the Indians retain their original right of possession and is not applicable to those set apart to an Indian reservation out of the public domain and not previously occupied by the Indians." (p. 457)

The court found against this contention.

On page 22 of his brief, appellant says that cases following *Pelican* require the same interpretation given by appellant. He cites the case of *State v. Muskrat,* 179 Minn. 180, 222 N.W. 611 (the correct title of this case is *People v. Cloud* and it appears in 228 N.W. 611). In this case the defendant, a Chippewa Indian, and enrolled as such, had an 80 acre allotment. The land was held for him in trust by the United States. He took a muskrat in violation of the

state game laws. The defendant contended that while residing on the allotment during the trust period he was a ward of the United States and that the state had no jurisdiction over him for the offense charged. With this the court agreed, saying:

> "Indians living on their reservations or on allotments held in trust for them by the United States under the allotment act are within the exclusive jurisdiction of the United States while on such reservation or allotment."

Citing:

> *U. S. v. Kagama,* 118 U.S. 375;
> *U. S. v. Celestine,* 215 U.S. 278;
> *U. S. v. Nice,* 241 U.S. 591.

That Section 1151 means what it says is conclusively shown by the terms of 25 U.S.C.A. Sec. 334, which provides for allotments to Indians *"not residing upon a reservation,* or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive Order. . . ." This statute was based on the original Dawes Act respecting allotments and provides "that patents shall be issued to them for such lands in the manner and with the restrictions as provided in Sections 348 and 349". The statute is silent as to the *source* of the allotment, and treats all allotments alike regardless of source. Section 349 provides as follows:

> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and crimi-

nal, of the State or Territory in which they may reside . . . *provided further, that until the issuance of fee simple patents all the allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States. . . .*"

The phrase "Indian titles to which have not been extinguished" in Section 1151 can have only one meaning. As above shown, 25 U.S.C.A. Section 334 et seq. provides that when the holder of the allotment has complied with all the trust provisions and the United States has given a patent thereto and has divested itself of all ownership, then, and only then, is the Indian title extinguished.

The leading authority on Indian law, Felix S. Cohen, in his "Handbook of Federal Indian Law", summarizes what constitutes "Indian country" as follows:

"(1) Tribal land is considered Indian country for purposes of federal criminal jurisdiction.

(2) An allotment held under patent in fee and subject to restraint against alienation is likewise considered Indian country for purposes of federal criminal jurisdiction.

(3) *An allotment held under trust patent, with the title in the Government, is likewise considered Indian country during the trust period.*

(4) Rights-of-way across an Indian reservation are considered 'Indian country' for some or all purposes of federal criminal jurisdiction." (p. 538)

Appellant's reference to Indian liquor legislation (Br. p. 26) directs our attention to Judge Goodman's analysis of such legislation, whereby he demonstrates that Federal jurisdiction over Indian allotments is inviolate *regardless of source* (165 Fed. Supp. 946).

We therefore conclude that Section 1151, in clear and unambiguous language, includes "all Indian allotments" within the definition of "Indian country" regardless of source.

(3) The federal statutes vest "exclusive" jurisdiction in the courts of the United States.

Appellant next argues that the statutes do not confer upon the United States exclusive jurisdiction (Br. pp. 27-29). He argues that California has at least concurrent jurisdiction (Br. pp. 29-30).

These contentions are in direct conflict with the clear and unambiguous language of the statutes. Thus, 25 U.S.C.A. Sec. 3242 expressly provides that all Indians committing any one of the ten major crimes within Indian country "shall be tried in the *same courts* and in the same manner, as are all other persons committing any of the above crimes *within the exclusive juisdiction of the United States*".

Again, 25 U.S.C.A. Sec. 349, in reference to Indian allottees, provides:

> "Provided further, that until the issuance of fee simple patents all allottees to whom patents shall be issued shall be subject to the *exclusive jurisdiction* of the United States."

This same argument was made by appellant before the District Court, and the court concluded:

> "This contention is wholly untenable. The language of the Act which specifies that Indian offenders subject to the Act 'shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States' clearly contemplates that Indian offenders shall be tried exclusively in the federal courts. *There are many cases that so hold, and none which hold to the contrary.*" (165 Fed. Supp. 948.)

The cases cited by the District Court are:

Ex parte Pero, 7 Cir., 1938, 99 F. (2d) 28;

Yohyowan v. Luce, D.C. 1923, 291 F. 425;

State v. Pepion, 1951, 125 Mont. 13, 230 P. (2d) 961;

State v. Columbia George, 1901, 39 Or. 127, 65 P. 604;

People ex rel. Cusick v. Daly, 1914, 212 N.Y. 183, 105 N.E. 1048;

State v. Condon, 1914, 99 Wash. 97, 139 P. 871;

Ex parte Cross, 1886, 20 Neb. 417, 30 N.W. 428;

State v. Campbell, 1893, 53 Minn. 354, 55 N.W. 553, 21 L.R.A. 169.

To these cases, there might well be added *State ex rel. Irvine v. District Court,* 239 P. (Mont.) 272 where the court said:

> "We should keep in mind that we are here dealing with federal laws, enacted by Congress in the interests and protection of the 'nation's wards'.

'The authority of the United States Government is supreme in its cognizance of all subjects which the Constitution has committed to it. Consequently, there can be no conflict of authority, in the sense here given to the term between a state and a law of the United States in respect of such a matter, the former being always subordinate and the latter paramount. * * * The states * * * cannot invade a field which belongs exclusively to Congress. Likewise, where Congress has legislated upon a subject which is within its constitutional control and over which it has the right to assume exclusive jurisdiction and has manifested its intention to deal therewith in full, the authority of the states is necessarily excluded. * * *' " (p. 278)

None of the cases cited by appellant are to the contary. For example, *Ex parte Nowabbi* (Br. p. 27) was decided solely upon the exclusionary clause of 25 U.S.C.A. 349, excluding Indians residing in the former Indian Territory from Federal jurisdiction; and *State v. McAlhaney* (Br. p. 27) merely held that a white defendant was not within the purview of the Indian statutes.

Concurrent jurisdiction cases like *In re Dickson* and *California v. Zook* (Br. p. 30) have no application here since they apply only to those situations where Congress has not asserted exclusive Federal control.

We again refer to 18 U.S.C.A. Sec. 1162 passed by the 83rd Congress in 1953, where, *for the first time,* California was expressly given jurisdiction over crimes committed by or against Indians in the In-

dian country. Obviously, if the United States did not have exclusive jurisdiction prior to this time, there would have been no necessity to so provide.

(4) The doctrine of United States v. Kagama was and is the law of the land, until Congress provides otherwise.

Finally, on pages 30 to 36 of his brief, appellant advances a strange argument: that the doctrine of wardship of the United States over the Indians enunciated by the United States Supreme Court in *United States v. Kagama,* 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228, together with all applicable Federal statutes, should be disregarded and overthrown by this Court as obsolete.

The argument seems to be based on the idea that the diminution of Federal control over Indians and the grant of national and state citizenship to them abolishes their status as wards of the Federal government. Citizenship, however, has never been the basis of Federal guardianship over the Indian. As early as 1924 Congress specifically provided that Indians born in the United States are citizens of the United States (8 U.S.C.A. Sec. 1401). Therefore, all such Indians were and are citizens of the state in which they reside. (U. S. Constitution, Amendment XIV). Nevertheless, the United States Supreme Court has consistently held that the grant of citizenship in no way changed the status of the Indian as a ward of the Federal government:

Board of Commissioners of Creek County v. Seber, 1943, 318 U.S. 705, 718, 63 S. Ct. 920, 87 L. Ed. 1094;

Tiger v. Western Investment Co., 1911, 221 U.S. 286, 31 S. Ct. 578, 55 L. Ed. 738;

United States v. Celestine, 1909, 215 U.S. 278, 30 S. Ct. 93, 54 L. Ed. 195.

As the District Court pointed out in this case:

"The (Supreme) Court has repeatedly stated that it rests with the Congress to determine when and how the national guardianship shall be brought to an end, and whether the emancipation shall at first be complete or only partial." (Citing *Board of Commissioners of Creek County v. Seber,* 1943, 318 U.S. 705, 718, 63 S. Ct. 920, 87 L. Ed. 1094; *United States v. Nice,* 1915, 241 U.S. 591, 598, 36 S. Ct. 696, 60 L. Ed. 1192; *Tiger v. Western Investment Co.,* 1910, 221 U.S. 286, 310 et seq., 31 S. Ct. 578, 55 L. Ed. 738; *Perrin v. United States,* 1913, 232 U.S. 478, 34 S. Ct. 387, 58 L. Ed. 691; *United States v. Sandoval,* 1913, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107; *United States v. Rickert,* 1903, 188 U.S. 432, 445, 23 S. Ct. 478, 47 L. Ed. 532.) (165 Fed. Supp. 948-949.)

It may be that Congress will decide at some time in the future that all American Indians have become so integrated in the life of their respective communities that all wardship should be terminated and jurisdiction over crime vested in the state courts. The facts remains, that in respect to California Indians, Congress did not make this determination until 1953, long after the commission of the crime here involved.

CONCLUSION.

In the early history of the western states, there was bitter conflict between native Indians and the first white settlers. The white man became master, but the bitterness persisted. Many statutes were passed denying Indians equal rights under the law. For example, in California, a white man could not be convicted of any offense upon the testimony of an Indian and Indian minors could be bound out to labor (Cal. Stats. 1850, p. 409; Cal Stats. 1853, p. 179). As a result, the American Indian became a ward of the United States (*United States v. Kagama, supra*), and, in the administration of its wardship, Congress passed the various statutes vesting exclusive jurisdiction over Indians in the Federal courts. These statutes remained in effect in California until 1953. Thus, Carmen, at the time of the alleged crime, was a ward Indian, and entitled to all the rights and benefits of the laws which Congress had enacted for the benefit of the Indians.

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May 25, 1959.

Respectfully submitted,
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